JAN 23 1981

No. 79-1583

(Consolidated with No. 79-1429)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL COTTON COUNCIL OF AMERICA,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, *et. al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONER, NATIONAL COTTON COUNCIL OF AMERICA

CHARLES M. CRUMP
APPERSON, CRUMP, DUZANE
& MAXWELL
2610 - 100 North Main Building
Memphis, TN 38103
901/525-1711
Counsel of Record for Petitioner, National Cotton Council of America

JOSEPH A. MOSS
4143 27th Street, N.
Arlington, VA 22207
703/525-4063
Counsel for Petitioner, National Cotton Council of America

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Does substantial evidence in the record as a whole support OSHA's determination that the Occupational Safety and Health Standard promulgated as 29 C.F.R. § 1910.1043 (the "Standard") is economically feasible?

2. Does the Occupational Safety and Health Act require OSHA to demonstrate that a standard is reasonably necessary and that its benefits bear a reasonable relationship to its costs?

PARTIES IN COURT BELOW

Petitioners

American Federation of Labor & Congress of Industrial Organiations

Industrial Union Department, AFL-CIO

Amalgamated Clothing and Textile Workers Union, AFL-CIO

National Cotton Council of America

The National Cottonseed Products Association

The Cotton Warehouse Association

The American Cotton Shippers Association

American Textile Manufacturers Institute, Inc.[1]

Milliken & Company

Arkwright Mills

Spartan Mills

Blair Mills, Inc.

Hermitage, Inc.

Dan River, Inc.

Cone Mills Corporation

Mayfair Mills

Springs Mills, Inc.

Riegel Textile Corporation

Fieldcrest Mills, Inc.

West Point-Pepperell, Inc.

Respondent

Ray Marshall, Secretary of Labor, United States Department of Labor

---

[1] ATMI and the listed textile mills, Petitioners in No. 79-1429, are hereinafter referred to as the "Textile Petitioners."

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties in Court Below	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Jurisdicitonal Grounds	2
Statute and Regulation	2
Supplemental Statement of the Case	2
A. The Occupational Safety and Health Act	3
B. Petitioner, National Cotton Council of America, and the American Cotton Industry	3
C. Background	4
Summary of Argument	5
Argument	8
I. The Cost Estimate On Which The Court Of Appeals Affirmed OSHA's Economic Feasibility Determination Is Not Supported By Substantial Evidence In The Record As A Whole	8
A. The evidence of record shows the Standard's compliance cost to be three to five times greater than OSHA claims	8

B. The court of appeals did not carefully consider the economic feasibility evidence of the record in keeping with the standard of review which is prescribed for itself 10

C. OSHA's economic feasibility determination ignored the conclusion of its own contractor, that the Standard would severely impact the American cotton industry 15

D. OSHA misconstrued the findings of its contractor in making its economic feasibility determination 19

E. OSHA's economic feasibility determination did not consider the cost consequences to other cotton industry sectors of imposing the Standard on textile mills, nor was the impact of the Standard on the rest of American agriculture considered 21

II. OSHA Must First Determine That The Benefits Expected From Its Standard Bear A Reasonable Relationship To The Cost Of Complying With It, Else A Valid Showing Cannot Be Made That The Standard Is Reasonably Necessary 24

Conclusion 27

Appendix A-1

TABLE OF AUTHORITIES

Cases

American Federation of Labor, Etc. v. Marshall, 617 F.2d 636 (D.C. Cir. 1979) 1,5,7,10,25

American Petroleum Institute v. OSHA, 581 F.2d 493 (5th Cir. 1978) 25

Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 11

Chem-Haulers, Inc. v. ICC, 565 F.2d 728 (D.C. Cir. 1977) 11

FPC v. Texaco, Inc., 417 U.S. 380 (1974) 11

Industrial Union Department, AFL-CIO v. American Petroleum Institute, 100 Sup.Ct. 2844 (1980) 2,5,25

SEC v. Chenery Corp., 332 U.S. 194 (1947) 11

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 651 2

29 U.S.C. § 652(8) 3,A-1

29 U.S.C. § 655(b)(5) 3,6,15,A-1

29 U.S.C. § 655(f) 3,15,A-1

Regulations

29 C.F.R. § 1910.1043 ..... i,2
29 C.F.R. § 1910.1046 5
43 Fed. Reg. 27350-99 1
43 Fed. Reg. 27355 13
43 Fed. Reg. 27361-2 8
43 Fed. Reg. 27363 12
43 Fed. Reg. 27372 12,13,14
43 Fed. Reg. 27373 11,14
43 Fed. Reg. 27378 19
43 Fed. Reg. 27379 25
43 Fed. Reg. 27380, Tables 1 and 2 9
43 Fed. Reg. 27381 5
43 Fed. Reg. 27395 13
43 Fed. Reg. 27434 10
43 Fed. Reg. 28473-74 1
43 Fed. Reg. 35032-35 1
43 Fed. Reg. 56892-94 1

No. 79-1583

(Consolidated with No. 79-1429)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NATIONAL COTTON COUNCIL OF AMERICA,
Petitioner,

v.

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, *et. al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONER, NATIONAL COTTON COUNCIL OF AMERICA

OPINIONS BELOW

The opinion of the court of appeals is reported at 617 F.2d 636 (D.C. Cir. 1979) (Pet.App. 19-102).[2] The Occupational Safety and Health Standard at issue (Pet. App. 1-18) and the preamble which the Secretary of Labor issued with the Standard were filed on June 19, 1978 and are reported at 43 Fed. Reg. 27350-99 (June 23, 1978), as amended at 43 Fed. Reg. 28473-74 (June 30, 1978), and 43 Fed. Reg. 35032-35 (August 8, 1978), and 43 Fed. Reg. 56892-94 (December 5, 1978).

---

[2] "Pet. App." refers to the bound appendix filed in No. 79-1429. "J.A." refers to the joint appendix filed in this Court. "Tr." refers to the transcript of the agency rulmaking proceedings.

JURISDICTIONAL GROUNDS

The judgment of the court of appeals was entered on October 24, 1979 and petitions for rehearing were denied on January 11, 1980 (Pet. App. 103). The Petition for a Writ of Certiorari in No. 79-1583 was filed on April 9, 1980, the petition in No. 79-1429 on March 14, 1980, and the petition in No. 79-1789 on May 9, 1980. The petitions were granted on October 6, 1980. In No. 79-1789, involving application of the Standard to cotton warehouses and shippers' classing offices, judgment was vacated and the case was "remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of *Industrial Department, AFL-CIO* v. *American Petroleum Institute,* 448 U.S. ____ (1980)." The cases in 79-1429 and 79-1583 were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION

The statute involved is the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, *et seq.* Pertinent provisions, Sections 3(8), 6(b)(5) and 6(f), are appended hereto.

The Cotton Dust Standard, 29 C.F.R. § 1910.1043, is set forth in the Appendix to Petition for Writ of Certiorari of the Textile Petitioners. (No. 79-1429 at pages 1-18)

SUPPLEMENTAL STATEMENT OF THE CASE[3]

---

[3] Petitioner, the National Cotton Council, adopts the more complete Statement of the Case presented in the Textile Petitioners' brief. This Statement of the Case presents only those facts germane to the arguments advanced in NCC's Brief.

A. The Occupational Safety and Health Act

The Act defines an occupational safety and health standard as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary* or appropriate to provide safe or healthful employment and places of employment." (Emphasis added) 29 U.S.C. § 652(8)

The Secretary is required to "set the standard which most adequately assures, *to the extent feasible,* on the basis of the *best available evidence,* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." Additionally, the standard "shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. . . . Other considerations shall be the latest available scientific data in the field, the *feasibility* of the standards, and the experience gained under this and other health and safety laws." (Emphasis added) 29 U.S.C. § 655(b)(5)

Section 6(f) of the Act provides that, upon judicial review, the determinations of the Secretary shall be conclusive, and the standard upheld, only if supported by "substantial evidence in the record considered as a whole." 29 U.S.C. § 655(f)

B. Petitioner, National Cotton Council of America, and the American Cotton Industry

The National Cotton Council of America (NCC) is a not-for-profit corporation organized and existing under the laws of the State of Tennessee with its principal office in Memphis, Tennessee. It was chartered for the purpose of increasing throughout the world the consumption of cotton, cottonseed and the products thereof produced in the United States of America, and by so doing, to improve the economic and social

status and the welfare of the people of the United States engaged in various aspects of the cotton industry from the farm to the textile manufacturers.

The record below establishes the significant value of the American cotton industry to the nation. Cotton provides about $3.8 billion in farm income to growers in an 18-state region; more than $11 billion is invested in land and equipment to grow cotton, and billions more are invested in cotton gins, cottonseed oil mills, warehouses and compresses, and raw cotton merchandising operations, which involve classing offices and textile mills; cotton is the highest value crop grown in the Cotton Belt states and ranks fourth in the entire U.S.; cotton accounts for more than $1 billion annually in exports.[4]

NCC's constituency includes members from all seven segments of the U. S. raw cotton industry: producers (farmers), ginners, warehousemen and compressmen, merchants (shippers), cottonseed crushers, cooperatives,[5] and textile manufacturers.

Approximately 70 percent of the volume of cotton, cottonseed and its products is grown, handled or processed by dues-paying members of NCC.

C. Background

As originally promulgated, the Standard included in its application warehouses, shippers' classing offices, cottonseed oil

---

[4] Exhibit 65, pages 2, 3: Testimony of G. C. Cortright, Jr.

[5] Cooperatives are organizations of cotton farmers who also are involved in one or more of the other major processing or handling functions of the industry, e.g., ginning, warehousing, merchandising, crushing and textile manufacturing.

mills and textile mills. 43 Fed. Reg. 27381.[6] On October 24, 1979, the court below affirmed the Standard except as it relates to cottonseed oil mills. That part of the Standard was remanded because OSHA's position with regard to economic feasibility was "too unclear." 617 F.2d 636, at 673 (Pet.App. 92)

On October 6, 1980, this Court granted the petition for a Writ of Certiorari in No. 79-1789 (filed on behalf of warehouses and classing offices), vacated judgment, and remanded the case to the court below for further consideration in light of *Industrial Union Department AFL-CIO* v. *American Petroleum Institute,* 100 Sup.Ct. 2844 (1980).

Although textile manufacturing is the only NCC member sector for which the Standard in question is currently in effect, its enforcement will affect *every* sector of the American cotton industry because all the sectors are interdependent.[7] Cotton production, ginning, see crushing, warehousing and merchandising can survive only if cotton textiles can be produced and sold profitably.

SUMMARY OF ARGUMENT

The court of appeals held that an OSHA standard is economically feasible unless its compliance cost is so prohibitively expensive that it will put the entire regulated industry

---

[6] The ginning industry was covered under a separate standard (29 C.F.R. 1910.1046) which was vacated and remanded to OSHA on November 14, 1980 by the United States Court of Appeals for the Fifth Circuit because the agency failed to show that the standard was "reasonably necessary and appropriate." Cotton harvesting (the farm sector) was never covered by this or any cotton dust standard.

[7] Exhibit 101: Testimony of John S. Barr, III, page 7, JA 330, hereinafter referred to as "Exhibit 101."

out of business. 617 F.2d 636, at 661-662 (Pet. App. 67-69) The court below further held that the Act imposes on OSHA no requirement to show that a standard's cost bears some reasonable relationship to the benefits sought from compliance with it. 617 F.2d 636, at 662-666 (Pet. App. 69-77) The court of appeals thereby left no reasonable or practical restraints on OSHA's standard-setting authority consistent with Sections 6(b)(5) and 3(8) of the Act and granted license for the issuance of any occupational safety and health rule, so long as its costs will not ruin an entire regulated industry. This case calls on the Court to decide whether the court of appeals held properly on these critically important points.

Another issue is the question of whether OSHA's determination of economic feasibility is supported by substantial evidence in the record as a whole. In support of its feasibility determination, OSHA cited a compliance cost of $550 million for the standard which it promulgated. It attributed the estimate to industry witnesses.[8] But the industry estimate which OSHA cited dealt with compliance with a far less severe standard than the one OSHA issued. The evidence of record indicates that the Standard's cost could be three to five times what OSHA claims (see paragraph I-A of the Argument, *infra*). OSHA does not, and cannot, say that a compliance cost which may exceed $2.5 billion is feasible.

Further, neither OSHA nor the court of appeals considered how the substantial costs incurred at the textile mill level would affect the other, interdependent sectors of the cotton industry. The compliance-inflicted loss of volume at the textile mill level

---

[8] Exhibit 60, Att. 1, J.A. 251 (Pet. App. 154) and Exhibit 62, Att. 1 (Pet. App. 156): The testimony of Hovan Hocutt and Arthur Thomas, i.e., the "Hocutt-Thomas estimate." Hocutt and Thomas represented dust and temperature control manufacturers, not textile manufacturers.

would cost cotton farmers more than $100 million *per year* (see note 36, *infra*). The loss of volume would result in still further (though unestimated) costs at the ginning, warehousing, seed crushing and merchandising levels.

The court of appeals' refusal to assess meaningfully the record as a whole resulted in its failure to consider the cost impact of the Standard on the non-textile sectors of the industry, including farming. This further contributed to the court's misperception of the Standard's total cost and its economic consequences. The court's misperception of the facts concerning the Standard's economic feasibility is apparent in its observation: "Ironically, it is now the industry that challenges the accuracy of its own data." 617 F.2d 636, at 660 (Pet. App. 64) The industry did *not* challenge its own data. The industry challenged OSHA's misuse of its data to represent the cost of a standard far more severe and far more costly than the one for which the estimate was made. The court apparently failed to perceive the difference.

The court below affirmed an enormously costly Standard without substantial evidence showing it was economically feasible. And, despite the clear intent of Congress to require OSHA to be pragmatic in its rulemaking, the court below has conferred upon OSHA virtually unlimited authority to find *any* standard economically feasible — the only limitation being that it must not shut down the entire industry subject to the regulation. The decision of the court of appeals drains the Act's economic feasibility requirement of its intended meaning and its decision, therefore, should be overturned.

ARGUMENT

I. The Cost Estimate On Which The Court Of Appeals Affirmed OSHA's Economic Feasibility Determination Is Not Supported By Substantial Evidence In The Record As A Whole.

A. The evidence of record shows the Standard's compliance cost to be three to five times greater than OSHA claims.

Whether OSHA must show that its standards are economically feasible is not at issue in this case. OSHA concedes that the feasibility requirement of Section 6(b)(5) includes economic as well as technological feasibility. 43 Fed. Reg. 27361-2

A critical element in the economic feasibility question is the magnitude of the Standard's cost — i.e., will compliance with the Standard cost the cotton textile industry just over half a billion dollars as OSHA claims — and as accepted by the court of appeals — or will it cost three to five times that much as evidenced by any fair assessment of the record?

For textile manufacturing there were only two compliance cost estimates in the record. One was supplied by Research Triangle Institute (RTI) with whom OSHA contracted. This was the only estimate in the record for achieving the required 0.2 mg/m3 exposure limit in the opening through warping operations of textile manufacturing. That estimate in 1974 dollars was $1.112 billion.[9]

---

[9] RTI estimated capital costs for the opening through spinning operations at $984.4 million (Exhibit 6, No. 76, p.I-15, Table I-6, J.A. 74, Pet.App. 139). For the twisting through warping operations, RTI estimated capital costs of $127.7 million to reach 0.2 mg/m3 (Exhibit 6, No. 76, p.V-28, Table V-11, J.A. 94, Pet.App. 140). RTI's total estimate for reaching 0.2 mg/m3 in the opening through warping operations is therefore $1.112 billion in 1974 dollars.

The second was the Hocutt-Thomas estimate (note 8, *supra*). It was based on the cost of controls to reduce dust levels to 0.2 mg/m3 in opening through roving operations, to 0.5 mg/m3 in spinning through warping operations and to 1.0 mg/m3 in slashing and weaving operations. (Exhibit 60, Att. 1, J.A. 251, Pet. App. 154; Exhibit 62, Att. 1, Pet. App. 156). The Hocutt-Thomas estimate of the cost of capital to reach these dust levels was $550 million. This figure was appropriated by OSHA to reflect the capital cost to comply with its much more severe standard. (43 Fed. Reg. 27380, Tables 1 and 2)

The Hocutt-Thomas estimate in no way reflects the cost of complying with the Standard OSHA promulgated. But even the much higher RTI estimate of $1.1 billion for complying with the Standard in the opening through warping operations understates the Standard's total compliance cost to the textile sector.[10] Adjustment for inflation between 1974 and the time of promulgation would boost the RTI estimate of $1.1 billion for opening through warping up to $1.54 billion.[11] This figure alone is three times what OSHA says the Standard will cost. If automated opening and chute-fed systems for carding are required, another $818 million in capital cost will be incurred.[12]

---

[10] The record is void of any estimate of the cost of reducing dust levels to 0.75 mg/m3 in weaving operations.

[11] RTI considered the Wholesale Price Index for machinery and equipment to be a reliable indicator of price increases for textile plant and equipment expenditures (Exhibit 6, No. 76, C-20, Table C-12, J.A. 139). That Index rose from 139.4 in 1974 to 195.1 in June of 1978 (Monthly Labor Review, March 1975, p. 114, and October 1978, p. 94). Thus, $195.1/$139.4 x $1.1 = $1.54.

[12] Exhibit 69, pp. 25-28, J.A. 263-265. It is not clear whether automated opening equipment and chute-fed cards should be factored into compliance costs. OSHA's brief in the court below would indicate that production costs will be saved by the installation of such equipment. But, if OSHA expects the industry to install this kind of production equipment to comply with the Standard and the associated dust control equipment the record shows would be required (TR. 2377, 2451-53, 2463-65), then these costs should, indeed, be considered a part of compliance cost.

This addition alone would raise compliance costs to almost $2.4 billion ($1.54 billion + $818 million). And nothing is included for costs associated with the Standard's restrictions on the common practice of blow-down cleaning.[13] So the Standard's total cost could well approximate the magnitude of the *proposed* Standard's compliance cost — i.e., $2,696,500,000[14] — and exceed OSHA's $550 million estimate of compliance cost nearly five-fold.

B. The court of appeals did not carefully consider the economic feasibility evidence of the record in keeping with the standard of review which it prescribed for itself.

Although the court of appeals articulated a standard for a thorough, careful review of the record as a whole, 617 F.2d 636, at 648-652 (Pet.App. 38-46), its review was not sufficiently thorough to discern the difference between what the record contained and what OSHA and OSHA's counsel *said* the record contained.

In affirming OSHA's economic feasibility determination, the court below said:

> . . . OSHA's technological assessment concluded that little more than the dust control measures assumed by the industry would be necessary to achieve the final PEL. 617 F.2d 636, at 660 (Pet. App. 65)

---

[13] The Standard prohibits compressed air blow-down cleaning except where alternative means are not feasible. 43 Fed. Reg. 27396 Where blow-down is used, those employees not directly involved are required to leave the area during the cleaning operations. This means that employers would have to shut down machinery for substantial periods of time during the workday. (LeSourd Tr. 545; Wright Tr. 636-638; Neefus Tr. 2060-2061; Hocutt Tr. 2363; Thomas Tr. 2532; Fitzgerald Tr. 2706)

[14] Exhibit 6, No. 76, page I-15, Table I-6, J.A. 74 (Pet. App. 139).

The record was not cited in support of this statement. Instead, statements by OSHA's counsel in their brief were referenced. 617 F.2d 636, at 660, note 136 (Pet. App. 65)

In their brief in the court below, OSHA's counsel attempted to defend the agency's use of the Hocutt-Thomas estimate by making the raw assertion that it "reasonably appeared to OSHA that Hocutt's suggested dust control techniques would require little additional effort or cost to achieve" the PELs required by the Standard.[15] This was a *post hoc* rationalization of counsel, not a finding by the agency.[16] The agency's stated reason for using the Hocutt-Thomas estimate was simply that it was more recent than RTI's:

> Since ATMI (Hocutt-Thomas) estimates are based on the most recent data, OSHA believes them to be more realistic than those offered by the IIS (Inflationary Impact Statement) on the information available to RTI. 43 Fed. Reg. 27373

This cannot be construed by OSHA's counsel as a finding by the agency that compliance with its Standard can be achieved with "little additional effort or cost." This is particularly true with respect to the spinning operation where the agency found just the opposite:

> OSHA, however, does recognize that implementation of the standard in certain operations, such as spinning, where the application of ventilation controls may involve unusual

---

[15] OSHA's brief in the court below, at p. 113.

[16] *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168 (1962) ("The courts may not accept appellate counsel's *post hoc* rationalizations for agency action. . . ."); SEC v. *Chenery Corp.*, 332 U.S. 197, 196 (1947); *Chem-Haulers, Inc.* v. *ICC*, 565 F.2d 728 (D.C. Cir. 1977).

> difficulties, significant innovation or indeed necessitate more than improvement in existing technology to achieve compliance, may be difficult. 43 Fed. Reg. 27363

The "little more" theory is clearly a charade of OSHA's counsel which would have been exposed as such had the court below adhered to the standard of review which it prescribed for itself. But even if the agency itself had found that compliance with the Standard could be achieved with Hocutt's techniques plus a "little additional effort or cost," the court below should have required identification of the additional techniques and quantification of their costs.

OSHA's attempt to qualify the Hocutt-Thomas estimate as representative of the cost of complying with the Standard it promulgated is equally without merit. The agency claimed that the Hocutt-Thomas estimate of the cost of complying with a less stringent standard than the one it adopted was overstated. But none of the reasons the agency gave for this conclusion is supported by the evidence of record.

First, OSHA said:

> Compliance with the final regulation will be less costly than it would have been for the proposed regulation. 43 Fed. Reg. 27372

This observation about the comparative costs of the final versus the proposed standard is totally irrelevant since Hocutt and Thomas did not estimate the cost of either the proposed Standard or the final Standard.

Second, OHSA surmised that:

> . . . the equipment reported and estimated for retrofit control *may have* included some equipment which is used exclusively for synthetics. (Emphasis added) 43 Fed. Reg. 27372

This statement is pure speculation. But, even if synthetic processing equipment were included, this does not mean that the Hocutt-Thomas estimate is overstated. The OSHA-stipulated dust measuring device — the vertical elutriator — cannot distinguish between synthetic dust and cotton dust.[17] So all dust must be controlled in areas where cotton and synthetics or cotton/synthetic blends are produced. Therefore, the cost for dust abatement devices for this equipment cannot be excluded.

Third, the agency said:

> While OSHA recognizes the validity of estimating compliance costs for retrofit controls, OSHA also recognizes the existing trend toward replacement of conventional machines with newer equipment which is more productive and produces less dust and which would lead to the prediction of fewer machines to be retrofitted or to be controlled. 43 Fed. Reg. 27372

Here the agency speculates that newer machines would have a lower dust-producing propensity, which would result in the need for fewer machines to be retrofitted with dust abatement equipment. No support was cited for this assumption. Rather, in its brief in the court below, OSHA acknowledged its own contractor's findings that (a) there was little innovative technology which would offer productivity savings and (b) the cost of necessary ventilation would be about the same for the new machines as for the old ones.[18] But even if OSHA's theory were true, the cost of the new machinery would have to be included in the cost of compliance.[19]

---

[17]The vertical elutriator is designed to capture respirable dust, i.e., any dust particles of up to approximately 15 microns. (43 Fed. Reg. 27355) Cotton dust is defined as "dust present during the handling or processing of cotton which may contain a mixture of many substances. . . ." 43 Fed. Reg. 27395

[18]OSHA's brief in the court below, p. 51, note 54.

[19]See note 12, *supra.*

Fourth, OSHA said the Hocutt-Thomas estimate failed to account for technological improvements that might occur during the four-year compliance period:

> While the costs of retrofit are based on currently and commercially available technology controls, the estimates fail to reflect improvements in technology that are likely to continue during the period of compliance. 43 Fed. Reg. 27372

Again, the statement lacks record support. It is refuted by Hocutt's testimony which indicates expectations for little new technology which would reduce compliance costs in spinning through weaving in the next seven years (Tr. 2388-93, J.A. 459-463).

Finally, the agency said:

> . . . since the ATMI estimates include some costs of compliance with the current regulation OSHA finds them to be overstatements of the incremental cost of this regulation. 43 Fed. Reg. 27373

While it is true that the ATMI (Hocutt-Thomas) estimate includes some expenditures already made, it does not mean the estimate is overstated. It is simply further evidence that Hocutt and Thomas provided a realistic estimate of the cost to achieve the exposure limits on which the estimate was based.

The result of these positions by OSHA and its counsel is that the agency is left with no way to make a valid finding that the Standard is economically feasible. The only cost estimate in the record for complying with a 0.2 mg/m^3 exposure limit in the opening through warping operations was RTI's. When OSHA rejected the RTI estimate it rejected the only estimate of the cost of complying with the mandated PEL in opening through warping. The Hocutt-Thomas estimate which the agency relied upon related to the cost of complying with substantially higher exposure levels than required by the final Standard.

The upshot is that OSHA does not know what it will cost to comply with its Standard. The agency and its counsel admit as much:

> Although it reasonably concluded that industry costs were overstated OSHA *could not quantify the margin of error or attempt to calculate a closer estimate* for the PEL's finally selected . . . (Emphasis added) OSHA's brief in the court below, p. 113

The court below accepted as a valid finding an economic feasibility determination which, by the agency's admission, was based on an unknown cost of compliance. Petitioner respectfully submits that *no* evidence can hardly be deemed *sufficient* evidence to satisfy the *best available* evidence requirement of Section 6(b)(5), nor can it be considered *substantial* evidence within the meaning of Section 6(f). Consequently, the agency's economic feasibility finding is not supported by substantial evidence in the record as a whole and the decision of the court below should be overturned.

C. OSHA's economic feasibility determination ignored the conclusion of its own contractor, that the Standard would severely impact the American cotton industry.

Research Triangle Institute (RTI) assessed the economic impact of a capital cost of $2,696,500,000 on the cotton industry in its study of the proposed Standard's inflationary impact.[20] Since the evidence of record indicates the final Standard's capital costs will likely be of the same magnitude, RTI's economic impact findings are relevant.

---

[20]Exhibit 6, No. 76, page I-15, Table I-6, J.A. 74 (Pet.App. 139).

Regarding a capital cost of $2,696,500,000, RTI said:

> . . . unless the compliance capital investments are spread over a substantial number of years, *all* the companies engaged heavily in cotton yarn spinning and weaving processes will face *severe difficulty* in financing capital costs . . . (Emphasis added)[21]

Dr. David LeSourd, project leader in RTI's study, further stated that compliance would take as much as eight years or more. Tr. 562, J.A. 415

It should be noted that RTI's observations about the need to spread compliance costs over a substantial number of years were made at a time when the proposed Cotton Dust Standard was calling for a staging-in of engineering controls over a seven-year period. But, in the final Standard, OSHA shortened the compliance period, requiring installation to be completed in four years.

RTI found that a standard with capital costs of $2,696,500,000 would add 21¢ per pound to the price of cotton yarn[22] and result in a reduction of 150,303,000 pounds (313,000 bales) in raw cotton consumption by U.S. mills.[23] While this loss of volume is significant, NCC demonstrated in its testimony that RTI's 150,303,000 pound estimate seriously understates the probable loss in cotton consumption for two reasons.

First, RTI inappropriately used empirical information on short-term responses to price changes to judge responses and compute losses that would develop over the long-term as a result of the price increases the Standard would necessitate.

---

[21] *Ibid.*, page VI-127, J.A. 131.

[22] *Ibid.*, page VI-90, Table VI-23, line 2, column 3.

[23] *Ibid.*, page VI-106, Table VI-31.

The U.S. Department of Agriculture expressed its concern about RTI's misuse of USDA elasticity coefficients during the hearings:

> . . . we believe that the inflationary impact analysis conducted by the Research Triangle Institute substantially underestimates the price impact on cotton consumption of implementing the proposed new regulations. The erroneous use of elasticities designed only for short-run use is primarily responsible. . . . Consequently, based on the increased costs of implementing the proposed cotton dust standards and their impact on cotton prices, we believe that consumption will fall much sharper than envisioned in the inflationary impact statement. Thus, the economic impact on the cotton industry will be much more severe.[24]

Moreover, RTI did not even take into account the loss of volume resulting from increased imports and decreased exports of cotton textile products that will surely result from a significant increase in the price of domestically-produced cotton textiles versus foreign-produced cotton textiles.[25] During cross-examination, RTI's Dr. David LeSourd said:

> . . . we confined our analysis to a *discussion* of the foreign trade issues, the factors affecting it and we *did not attempt to quantify* the resultant changes. . . . (Emphasis added) Tr. 596, J.A. 417

During the hearings, NCC noted the potential serious impact of the Cotton Dust Standard on the U.S. trade balance in cotton textiles and textile products. Specifically, NCC witness John S. Barr, III stated:

---

[24]Exhibit 92C, pages 2 and 3, J.A. 325-326.

[25] Exhibit 101, pages 4 and 7, J.A. 327 and 330. Also, Exhibit 158: NCC's Post Hearing Comments, page 3.

> In 1975 the deficit widened to more than 600,000 bales, largely the result of a price disadvantage for U.S. cotton textiles. Imported cotton textiles accounted for 20 percent of domestic cotton consumption in 1976.
>
> We find RTI's conclusion that the proposed standard would have no effect on foreign trade in cotton textiles difficult to reconcile with their observations that "large changes in the relative prices of domestic and foreign textile and apparel products do have an impact upon the domestic textile industry."
>
> RTI's study indicated that cotton fabric and yarn prices would have to increase nearly 18 percent to pay for the standard. Undoubtedly, they view this change as too small to make any difference in the ability of the U.S. cotton textiles to compete in world markets. Yet, they observe that "international monetary changes since August 1971 have had a significant effect upon foreign trade of U.S. textile products." RTI failed to note that these monetary changes were equivalent to a 7.5 or 8.5 percent change in the price of U.S. cotton textiles — less than half the price increase which they estimate would be required to pay for the dust standard.[26]

With regard to the inflationary impact of a standard requiring a capital outlay of $2,696,500,000, RTI said:

> The inflationary impact, with or without the cotton waste sectors, is *significant*. . . . Increases in the Consumer Price Index of 0.372 (or 0.365) . . . are *large* increases . . . to result from actions within a single sector of the economy. (Emphasis added)[27]

---

[26]Exhibit 101, page 7, J.A. 330.

[27]Exhibit 6, No. 76, page VI-104.

In summary, OSHA's own contractor found that a standard with compliance costs of the same magnitude as those of the final Standard would cause severe difficulties in securing compliance capital, would add 21¢ per pound to the price of cotton yarn, would cause a substantial reduction in cotton consumption and would cause a large increase in the Consumer Price Index.

D. OSHA misconstrued the findings of its contractor in making its economic feasibility determination.

OSHA purports to quote RTI in saying the Standard's cost is "manageable". 43 Fed. Reg. 27378 However, RTI's reference to "manageable" costs related to its assessment of the impact of a far less stringent standard than the one finally promulgated by OSHA.

At the point in its study where the term "manageable" was used, RTI was attempting to express the probable impact of compliance costs for the ginning industry, together with compliance costs expected to be incurred in only three sectors of the textile industry, identified as Standard Industrial Codes (SIC) 2211 (weaving mills, cotton), 2221 (weaving mills, man-made fiber and silk) and 2241 (narrow fabric mills).[28] Compliance costs for the ginning industry were included because RTI expected these costs to be passed forward in the form of higher raw material prices at the textile mill level. All of the aforementioned textile industries use cotton in varying amounts, with industry 2211 being the largest in terms of cotton consumption. The term "manageable" was used by RTI to describe the impact of just one of several assumed costs.

---

[28]Exhibit 6, No. 76, page VI-95 and VI-98, J.A. 125, 127 and 130.

RTI in fact said:

> The financial impact for SIC Code 2211 appears *very high* even for the 0.2 mg/m³ exposure limit. The 0.5 mg/m³ exposure limit would impact much less severely and the cost burden of compliance would be *manageable* for all but the three smallest firms and possibly selected firms, especially in SIC Code 2211. (Emphasis added)[29]

The compliance cost which RTI considered to be "manageable" in industry 2211 was $135 million (i.e., the capital cost for achieving a 0.5 mg/m³ PEL, according to its study).[30] The compliance cost which RTI found to be very high in industry 2211 was $1.84 billion (i.e., its estimate of capital costs for compliance with a 0.2 mg/m³ PEL).[31]

The relevancy of both of RTI's findings (i.e., one cost being "manageable" and the other being "very high") can now be considered with respect to the final Standard's estimated compliance costs (i.e., $1.54 billion to perhaps more than $2.5

---

[29]Exhibit 6, No. 76, page VI-98, J.A. 130. The U.S. Department of Commerce defines industry 2211 (weaving mills, cotton) as, "establishments primarily engaged in weaving fabrics over 12 inches in width, wholly or chiefly of cotton." Most weaving establishments in industry 2211 spin their own yarns. Consequently, industry 2211 is the largest of the cotton-consuming textile industries.

[30] $16.905 million for ginning, $111.500 million for yarn preparation, and $6.771 million for weaving in industry 2211. The total is $135.176 million. See Exhibit 6, No. 76, page VI-19, Table VI-4a for yarn preparation costs and page I-14, Table I-5 for ginning and weaving costs.

[31]$292.190 million for ginning, $517.000 million for yarn preparation, and $1,028.230 million for weaving in industry 2211. The total is $1,837.420 million. See Exhibit 6, No. 76, Page VI-19, Table VI-4a for yarn preparation costs and page I-14, Table I-5 for ginning and weaving costs.

billion, paragraph I-A, *supra).* Clearly, the $135 million cost RTI judged to be manageable bears no resemblance to the much higher compliance cost of the final Standard. The "manageable" cost is only 5 percent to 9 percent of the final Standard's estimated cost and only 25 percent of OSHA's $550 million understatement of the cost.[32] Just as clearly, the cost RTI judged to be "very high" is of the same magnitude as the final Standard's expected cost.[33]

There are no data in the record, either from RTI or from any other source, which indicate that a compliance cost of from $1.54 billion to $2.5 billion is "manageable" by the cotton textile industry.

E. OSHA's economic feasibility determination did not consider the cost consequences to other cotton industry sectors of imposing the Standard on textile mills, nor was the impact of the Standard on the rest of American agriculture considered.

The evidence of record shows that the economic impact of the final Cotton Dust Standard will be severe, that the various industry sectors are interdependent; and that if the Standard is beyond the financial capability of one sector, it is, therefore, beyond the capability of all, for no sector is dispensable.[34]

---

[32] $\frac{\$.135}{\$2.5} = .054$; $\frac{\$.135}{\$1.54} = .088$; and $\frac{\$.135}{\$.550} = .245$.

[33] $1.84 billion judged by RTI to be "very high" versus the Standard's $1.54 billion to $2.5 billion expected cost.

[34] Exhibit 101, page 7, J.A. 330.

The record further shows that while cotton farmers are exempted from the Standard's coverage, they are by no means exempted from its consequences.[35] The full and very substantial impact of the Standard affects the American cotton farmer as surely as if he were directly covered by it. Even the approximately 150,000,000 pounds per year which RTI estimated would be lost as the result of a compliance expenditure of just over $2.5 billion represents more than a $100,000,000 loss *annually* to cotton farmers.[36] This would be equivalent to a direct annual cost to farmers with no corresponding benefits.[37] And, as the complete record shows, RTI's estimate does not approach the loss that could be expected if both the long term interfiber competition effects of the Standard and its adverse effects on the cotton textile trade balance are taken into account.[38]

Aside from the Standard's substantial impact on cotton farmers, which was never taken into consideration by OSHA, the Standard would obviously affect the whole of American agriculture. Testifying for the U.S. Department of Agriculture, P. R. Smith stated:

> It is estimated that if the proposed standard is adopted and enforced, perhaps 50 percent, and possibly more, of the U.S. cotton acreage would no longer be used to produce cotton. Farmers and mills would no longer be able to com-

---

[35] *Ibid.*, page 1.

[36] In 1976, when RTI's study was completed, the average price of base grade cotton (grade 41, staple 34) was 67.7¢/pound ("Cotton Price Statistics, "USDA, AMS, Cotton Division, Vol. 58, No. 13, August, 1977): 150,303,000 x 67.7¢ = $101,755,131. At October, 1980 prices ("Cotton Price Statistics," USDA, AMS, Cotton Division, October, 1980), the annual loss would be $129,000,000: 150,303,000 x 85.8¢ = $128,959,974.

[37] Additional, unquantified costs (in the form of lost revenue) would be inflicted on cotton ginners, warehousemen, seed crushers and merchants.

[38] Exhibit 101, pages 4-7, J.A. 327-330.

pete with their synthetic and foreign competitors who would not have to meet such a standard. This raises the question of what would be done with this 6 million or more acres that no longer could be used to grow cotton.

The main crops that compete for cotton acreage are the food and feed grains and soybeans. Food and feed grains are now in surplus supply. And, as a result, market prices are depressed. Large stocks of these commodities are under price support loans, requiring huge government outlays. While soybeans are presently in a tight supply situation, it is expected that enough acreage devoted to feed grains in 1976 will be diverted to 1977 soybean production to take care of that situation. The feed grain industry would not miss this diverted acreage. However, if several million acres of cotton land are diverted to food and/or feed grain production, the result will be disastrous for these crops and the country. In addition to the losses to the cotton industry, costs under government price support and storage programs would skyrocket, and further downward pressure would be exerted on food and feed grain market prices from the addition to existing surpluses for these crops. We believe some of the cotton acreage would be planted to sunflowers, which contain a high percentage of vegetable oil. This would add to the present worldwide surplus of vegetable oil.

We could well find ourselves in the same position we were in a few years ago when many billions of tax dollars were invested in surplus commodities exceeded four million dollars per day. This would force the government to require farmers to withdraw farmland from production until the surpluses could be worked off. Enormous sums would have to be expended to pay for idling this acreage.[39]

---

[39]Exhibit 92b, pages 4-5: Statement of P. R. Smith, Consultant to the Secretary, U. S. Department of Agriculture, on a proposed standard for exposure to cotton.

This potential impact on American agriculture was not taken into consideration by OSHA.

Moreover, OSHA's economic feasibility determination was contrary to the views of the Small Business Administration (SBA) and the President's Council on Wage and Price Stability (CWPS). Concerning the impact of a standard costing $2,696,500, SBA expressed concern that:

> . . . the OSHA regulations adopted will protect workers from cotton dust by shutting down the plants in which they are now employed.[40]

CWPS said the proposed standard would impose excessive costs and urged OSHA to:

> . . . consider the full range of alternatives and to develop the information on costs and benefits necessary for rational and effective standard development.[41]

The total disregard of the Standard's impact at the farm (and intermediate levels, see notes 36 and 37, *supra)* and the failure of the court below to consider the record as a whole deprived Petitioner of a proper judicial review.

II. Osha Must First Determine That The Benefits Expected From Its Standard Bear A Reasonable Relationship To The Cost Of Complying With It, Else A Valid Showing Cannot Be Made That The Standard Is Reasonably Necessary.

There is a conflict among the Circuits as to whether OSHA must show that there is a reasonable relationship between the cost of a standard and the benefits expected from it before a valid finding can be made that the standard is "feasible" and "reasonably necessary" to protect workers from "material im-

---

[40]Exhibit 170, Addendum No. 2: Policy Considerations on Small Business Impact of Proposed Regulations for Cotton Dust, page 13.

[41]Exhibit 111: Comments of the Council on Wage and Price Stability, page 37, J.A. 342.

pairment of health and functional capacity." OSHA contends (43 Fed. Reg. 27379) and the court below affirmed (617 F.2d 636, at 662-666 [Pet.App. 69-77]) that the Act requires only a showing that the benefits of the agency's standards are likely to be "appreciable" and, beyond that, it has no obligation to determine whether the expected benefits bear a reasonable relationship to the cost of achieving them. In direct conflict with the ruling of the court below is the decision of the Court of Appeals for the Fifth Circuit in *American Petroleum Institute* v. *OSHA*, when OSHA's benzene standard was set aside because the agency failed to show that the standard was reasonably necessary or that "the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard."[42]

Although this Court affirmed the Fifth Circuit's decision, it did so because, as a threshold matter, OSHA had not found:

> . . . the toxic substance in question poses a significant health risk in the workplace and that a new, lower standard is therefore "reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[43]

Since that threshold finding had not been made, this Court declined to address the further question of whether the court of appeals correctly held that there must be a reasonable correlation between costs and benefits.[44]

---

[42]581 F.2d 493, 503 (5th Cir. 1978).

[43]100 Sup.Ct. 2844, at 2850.

[44]*Ibid.*

In the instant case, the Court is again asked to provide a ruling on this important question involving OSHA's rulemaking authority. The nation's financial resources for health and safety protection are not unlimited. Consequently, OSHA must, as an essential part of its rulemaking procedure, give consideration to the expected benefits of its standards versus their costs. Unless OSHA attempts to ascertain, at least roughly, the relationship of benefits to costs, the inevitable result will be a waste of the nation's limited financial resources for safety and health protection.

OSHA's interpretation of the Act, to preclude an assessment of benefit expectations in relation to compliance costs, is inconsistent with the language of the Act, its legislative history and the weight of relevant precedent. Because the Textile Petitioners develop fully this argument, NCC adopts the statement of the Textile Petitioners and foregoes further treatment of this subject in this Brief.

CONCLUSION

OSHA has exceeded its rulemaking authority and the judgment of the court below should be reversed.

Respectfully submitted,

Charles M. Crump
APPERSON, CRUMP, DUZANE
& MAXWELL
2610 - 100 North Main Building
Memphis, TN 38103
901/525-1711

Counsel of Record for Petitioner,
National Cotton Council of America

Joseph A Moss
4143 27th Street, N.
Arlington, VA 22207
703/525-4063

Counsel for Petitioner,
National Cotton Council
of America

APPENDIX

APPENDIX

Pertinent Provisions of The Occupational Safety and Health Act of 1970

Section 3(8)

The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment. 29 U.S.C. 652(8)

Section 6(b)(5)

The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible,* on the basis of the *best available evidence,* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, *the feasibility of the standards,* and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired. (Emphasis added) 29 U.S.C. 655(b)(5)

Section 6(f)

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole. 29 U.S.C. 655(f)